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# Future reform of native title

3.1 Submissions to the inquiry raised a number of wider concerns about the native title system. Therefore, in addition to reviewing the Native Title Amendment Bill 2012, the Committee decided to conduct a roundtable to canvass these concerns.

3.2 This chapter reports on the discussions at the roundtable held in Sydney on 15 February 2013. The Committee does not necessarily endorse nor concur with these views; however, it has been clear through the course of this inquiry that there is a need for the issues below to be brought to the attention of the Government.

3.3 The issues reported here are indicative of those discussed during the day and it is suggested that interested parties refer to the full transcript of discussions.

## Good faith negotiation

3.4 There is general consensus amongst all stakeholders that the goal in native title claims is that they should be resolved as quickly and as equitably as possible, based on good faith negotiation. However, there is a divergence of opinion about whether 'good faith' objectives are working and if they need to be codified in legislative form.

3.5 The National Farmers Federation (NFF) stated:

> The National Farmers Federation has always been supportive of this system and has always been concerned that everything takes so long, but at last in the last 12 to 18 months we have seen a substantial improvement in the settlement of native title claims. For instance—I am talking about pastoral native title claims—in the years 2010-11 and 2011-12, 49 claims were settled, but in the six months from 1 July to 31 December 2012, 18 were settled. That is a

> big increase in number. It is estimated that in this current 2013 calendar year there will be 79 pastoral claims settled. That to me is improvement and shows that, with what we are currently doing and the system we currently have in place, good faith must be working.[1]

3.6 Similarly, mining industry representatives expressed a strong desire to participate in a more equitable system. The Chamber of Minerals and Energy (CME) noted:

> CME members are supportive of the objective stated by the Commonwealth government that they want to create a more efficient native title system. We fully support that objective. Our industry members have expertise in the native title regime and the future act regime and the negotiation in good faith regime. We would like the opportunity to be involved in more extensive discussions about what is working, what is not working and what needs to be changed. We have heard from people around the table today that there are very differing views on the effectiveness of the current future act regime and the negotiation in good faith regime. We have heard various reasons as to why that may be case. It indicates, however, that there is a need for further discussion around this issue. People are not united on whether or not there needs to be change to this regime. That is significant. We should not proceed with something if we do not understand what we are actually trying to fix in the first instance.[2]

3.7 The Minerals Council of Australia (MCA) noted that:

> We do however recognise the value of greater clarity in relation to the application of the good faith provisions, and in that vein for the past four years the Minerals Council of Australia has offered to work collaboratively with government and the National Native Title Council to develop some guidance on how negotiation in good faith could apply.[3]

3.8 The Aboriginal and Torres Strait Islander Commissioner noted that the practical definition of 'good faith' was not well understood:

> The second principle is the principle of our right to participate in decisions that affect us underpinned by good faith and the concept

1 John Stewart, Chair, Native Title Taskforce, National Farmers Federation (NFF), *Transcript of Evidence,* Sydney, 8 February 2013, p. 5.

2 Debra Fletcher, Manager, Land Access, Chamber of Minerals and Energy of Western Australia (CME), *Transcript of Evidence,* Sydney, 8 February 2013, p. 11.

3 Melanie Stutsel, Director Health, Safety, Environment and Community Policy, Minerals Council of Australia (MCA), *Transcript of Evidence,* Sydney, 8 February 2013, p. 6.

> of free, prior and informed consent. I know that when the declaration was being drafted the concept of free, prior and informed consent scared lots of people. They talked about it being a right of veto. We do not know about this stuff. It is a global document we are talking, and we struggle to work out what we mean by free, prior and informed consent. Is it a right of veto and how does it work? We are proposing the Human Rights Commission along with congress to hold a series of dialogues around the country over the next 18 months to work out what this means.[4]

3.9 Others argued that the good faith obligation was not working and this was leading to inequitable outcomes. Michael Owens noted:

> …particularly the obligations to negotiate in good faith. I have heard other people here talk about trench warfare and that it no longer exists. I am here to tell you that it does exist. I am here to tell you quite clearly that particularly in Queensland, which is my area of experience, trench warfare is alive and well. The good faith obligation is not working. … I think the fundamental thing that you have to understand—and this is where good faith has been let down—is that there was no legislative intent set out in the legislation, the Native Title Act, originally. What is good faith? What did parliament mean by that?[5]

## Funding issues

3.10 A number of funding issues were raised, including the withdrawal of Commonwealth assistance to pastoralists and to local government for responding to native title claims.[6]

3.11 The Attorney General's Department noted that:

> Can I firstly say that, of course, priority for funding is a matter for government. The government takes the view in this particular instance that there has been a significant amount of funding provided for a very long time in this space. The government's view is that much of the unique law and significant questions that need to be resolved have been resolved in native title. We have

4 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Transcript of Evidence,* Sydney, 8 February 2013, p. 3.

5 Michael Owens, private capacity, *Transcript of Evidence,* Sydney, 8 February 2013, p. 10.

6 See, for example, NFF, *Submission 4*, p. 1; Local Government Association of Queensland, *Submission 8*, pp. 7-11.

> heard around the table that native title has now become very much a part of business as usual for organisations. I should point out that we have very good relations with John and his organisation, and we very much respect the work they do; but government took the view that it needed to make savings in this space. It was not just this scheme that has been reduced. As a result, it is targeting funding in a different way. It believes, as I say, that most critical issues in relation to new areas of the law have been resolved; that native title is now a question of business as usual for parties; and that it was appropriate, in those circumstances, where there are other priorities for spending, where reductions have been made.[7]

3.12 The NFF argued that the cessation of funding will lengthen claim processes:

> The other thing I have to say is that 28 February is a very important day for native title from pastoralists' point of view. The current system is going to fall apart on 28 February, because that is as long as you can go before the current lawyers have to say, 'We cannot represent anyone anymore,' and then the pastoralists have to go and find their own lawyers. So on 28 February, believe me, if we do not have some funding to keep going, I think native title settlement of claims is just going to go down and down and down.[8]

3.13 Concerns were raised about levels of funding for native title representative bodies, The National Congress of Australia's First Peoples argued:

> The resources available to Aboriginal and Torres Strait Islander people to deal with native title both before determination is made and after determination is made are insufficient. Just to talk about the 'afterwards', the holding of the title, the management of the title and the interests, go to the prescribed body corporates, but there is no basis on which these prescribed body corporates, PBCs, are able to function and operate unless there is some income derived from agreements—mining or some other activities. But if there is not an income from agreements, if it is a recognition of rights that apply without other stakeholders providing some investment, then the traditional owners are left with this body

7 Kym Duggan, First Assistant Secretary, Social Inclusion Division, Attorney General's Department, *Transcript of Evidence*, Sydney, 8 February 2013, p. 15.

8 John Stewart, Director, Native Title Task Force, National Farmers Federation, Transcript of Evidence, Sydney, 8 February 2013, p. 5.

> forever, and future generations will have the problem of how manage those interests. Now that it has become for Aboriginal and Torres Strait Islander people a cash economy and society, that money just does not come from nowhere. So funding to prescribed body corporates is one of the areas that funding is required for.[9]

3.14 The onus of proof for claimants to establish ongoing connection to land (which is discussed in the following section) was put forward as a further reason for the need for ongoing funding:

> Because we have to go through all these levels of proof, we need a level of funding for this sort of research that we have to do to run claims. From the Yamatji Marlpa point of view, we would not probably survive as a representative body if not for funding from other sources other than FaHCSIA such as money from proponents et cetera.[10]

## Onus of proof for ongoing connection to land

3.15 As an option for future reform, native title interest groups proposed reversing the onus of proof which currently requires claimants to prove ongoing connection to land in the determination of native title. The Aboriginal and Torres Strait Islander Social Justice Commissioner noted:

> In my experience with native title, if there is one thing that causes the angst in our communities, it is connection reports. That is why we think some of these amendments do not go far enough. We think we should be looking at reversing the onus of proof on connection.[11]

3.16 The National Congress of Australia's First Peoples agreed, stating:

> … we believe that an important element that should have been included has not been included in the bill. We would still like it to be included, and that is where the onus of proof is put upon the extinguishment of native title, not upon the Aboriginal and Torres Strait Islander peoples having to prove native title.[12]

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9 Robert Malezer, Co-Chair, National Congress of Australia's First Peoples, *Transcript of Evidence,* Sydney, 8 February 2013, p. 23.

10 Carolyn Tan, In-house Legal Counsel, Yamatji Marlpa Aboriginal Corporation (YMAC), *Transcript of Evidence,* Sydney, 8 February 2013, p. 30.

11 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Transcript of Evidence,* Sydney, 8 February 2013, p. 3.

12 Robert Malezer, Co-Chair, National Congress of Australia's First Peoples, *Transcript of Evidence,* Sydney, 8 February 2013, p. 7.

3.17 The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) noted that the reversal of the onus of proof needed to be approached carefully:

> We need to be really careful about what the term 'reversing the onus of proof' means. What we want is a lower burden on Indigenous people in relation to proof that allows for the establishment of the right people … without undue burden in relation to historical grievances, and historical impacts. I know of one state government who will, for example, with the greatest intentions, provide a timeline of all of the events they think might have interrupted a group's connection with land and ask that they prove how they survived. We should not need to go through that process to establish current rights to country.[13]

3.18 The Association of Mining and Exploration Companies (AMEC) questioned whether this issue was really about the onus of proof or presumption of continuity:

> It is not necessarily about the reversal of the onus of proof. They are looking at the issue of a presumption of continuity. From a technical point of view—though I am certainly not a lawyer involved with this space—I understand that to be a slightly different thing.[14]

3.19 Nonetheless, the onus to prove connection is considered burdensome, as AIATSIS noted:

> Picking up on similar themes with regard to reforming the requirements of proof, it was never the intention of the legislature that section 223 of the act should become such a cumbersome and difficult process. We have what has become a judicial nightmare of test after test after test to prove connection to country. We have a word that you might think has an ordinary meaning, the word 'traditional', which now has a series of four tests attached to it about what traditional means, including having to prove generation by generation an ongoing, vibrant system of native title. That does not mean being able to make presumptions of continuity back, it actually means being able to show a connection to country right through each of those generations.[15]

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13 Lisa Strelein, Director of Research, Indigenous Country and Governance, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Transcript of Evidence,* Sydney, 8 February 2013, p. 25.

14 Graham Short, National Policy Manager, Association of Mining and Exploration Companies (AMEC), *Transcript of Evidence,* Sydney, 8 February 2013, p. 27.

15 Lisa Strelein, Director of Research, Indigenous Country and Governance, AIATSIS, *Transcript of Evidence,* Sydney, 8 February 2013, p. 24.

3.20 Mr Matthew Storey from the National Native Title Council (NNTC) claimed that onus of proof contributes to the slowing down of claims:

> There are three things that slow down claims. The two main things that slow down claims are the requirement to analyse the historical extinguishment data, collecting tenure histories, and the requirement to analyse traditional connection, the anthropological reports, and the logistics of the claims themselves. Some of the material, like section 47C, can greatly assist in the extinguishment tenure area. A rebuttable presumption greatly assists in the other. Those sorts of factors are the measures that we could do that would greatly speed up resolution of the claims process.[16]

## Power imbalances

3.21 Alongside the onus of proof which rests with native title claimants, several witnesses claimed that there are significant power imbalances in the present system, particularly in the processes of negotiation between native title claimants and mining and exploration companies.

3.22 The MCA acknowledged this and the contribution mining companies make to rectifying negotiation imbalances:

> …we would also note that we consider that in reviewing the native title system and the Native Title Act, we really need to focus on the system as a whole. The question about whether we have symmetrical outcomes being achieved, we consider, potentially relates more to the imbalance in the resourcing of parties in negotiations—an obligation that currently is largely met by mining companies in those negotiations rather than through independent funding arrangements. This potentially brings into question both the effectiveness and the independence of those negotiations for some stakeholders.[17]

3.23 A representative of Just Us Lawyers argued that the power imbalances are the most important issue to be addressed:

> I think if the committee really want to do something to address that, it is not about tinkering with the good faith negotiation provisions. You have to go further and look at what you can do to

16 Matthew Storey, Director, National Native Title Council (NNTC) and Chief Executive Officer, Native Title Services Victoria (NTSV), *Transcript of Evidence,* Sydney, 8 February 2013, p. 28.

17 Melanie Stutsel, Director Health, Safety, Environment and Community Policy, MCA, *Transcript of Evidence,* Sydney, 8 February 2013, p. 7.

> address power imbalance. With the consumer code is often the case where you have a power imbalance, where coercion and those sorts of things are outlawed. Those sorts of things are practical things that could be done to bring the relevant parties to the negotiation table.[18]

## International conventions

3.24 It was suggested that Australia's approach to native title should be guided by the United Nations Declaration on the Rights of Indigenous Peoples, and that this is fundamental to achieving an equitable native title process.[19]

3.25 The Aboriginal and Torres Strait Islander Social Justice Commissioner said:

> Speaking from an Aboriginal perspective, it is important to recognise that the issues that bother you also bother us. I said when I began in the position of Aboriginal and Torres Strait Islander Social Justice Commissioner that the declaration on the rights of Indigenous people will guide all the work that I do. In our submission we recommend that we need to ensure the native title legislation is consistent with our human rights as outlined in that declaration. For us in the Human Rights Commission, it means making the native title legislation consistent with what we consider to be the important principle of the declaration: self-determination.[20]

3.26 The National Congress of Australia's First Peoples supported the Commissioner's argument:

> I just wanted to take the opportunity to read article 27 of the Declaration on the Rights of Indigenous Peoples, which says:
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> *States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources,* …

18 Colin Hardie, Partner, Just Us Lawyers, *Transcript of Evidence,* Sydney, 8 February 2013, p. 15.

19 See, for example, Jon Altman and Frances Markham, *Submission 25*, p. 12.; Australians for Native Title and Reconciliation (ANTaR), *Submission 22*, p. 2.

20 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Transcript of Evidence,* Sydney, 8 February 2013, p. 2.

> That is what we are discussing in this roundtable.
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> I do not want to harp on this, but I just go back to the fact that the Native Title Act originally set up a tribunal to arbitrate on this matter, and then with the Brandy decision in the High Court the powers of the tribunal were lost back to the Federal Court. It replaced the concept of land councils, which was a concept of Aboriginal and Torres Strait Islander people, with the concept of native title bodies—services and procedures which are not representative of the traditional owners but in fact are service organisations to the traditional owners. Again, as people around the table have already said, these involve huge costs in relation to how people should appear before those courses.
>
> We think this is a long way away from 'fair, independent, impartial, open and transparent processes'.[21]

3.27 ANTaR noted that:

> We believe that reforms should not be implemented on an incremental or piecemeal basis given the enormous complexity of this legislation and the quite fundamental questions at stake. That is why we support the Social Justice Commissioner's call for a comprehensive inquiry and review of the native title process to fully realise the potential of the native title system and to achieve full compliance with the United Nations Declaration on the Rights of Indigenous Peoples.[22]

3.28 Several others argued that current native title legislation is inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples and that a full review was necessary to ensure that Australia was meeting its international obligations to this Declaration.[23]

## Consultation and ongoing dialogue

3.29 The issues raised in the roundtable pointed to the need for ongoing dialogue between all levels of government and stakeholders. A number of

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21 Robert Malezer, Co-Chair, National Congress of Australia's First Peoples, *Transcript of Evidence,* Sydney, 8 February 2013, p. 8.

22 Jacqueline Phillips, National Director Australians for Native Title and Reconciliation (ANTaR), *Transcript of Evidence,* Sydney, 8 February 2013, p. 12.

23 See, for example, Louise Bygrave, Australian Human Rights Commission, *Transcript of Evidence,* Sydney, 8 February 2013, p. 24; Matthew Storey, Director, NNTC and Chief Executive Officer, NTSV, *Transcript of Evidence,* Sydney, 8 February 2013, p. 29.

participants argued that further steps need to be taken to reform the entire native title system to improve outcomes.

3.30 The Committee received a range of submissions calling for the need for a comprehensive review of the native title system. Particular emphasis was placed on the need to ensure an equitable and sustainable balance will be struck between native title rights and interests and those of mining and exploration companies. In particular, Professor Jon Altman and Francis Markham provided the Committee with mapping to demonstrate the competing values, rights and interests over land in Australia. Professor Altman and Mr Markham commented that:

> Given the extent of Indigenous land holdings it is highly likely that in future more mining will occur on Indigenous lands, given that on native title lands even with exclusive possession native title groups cannot veto mining and given Australia's current high economic dependence on exports of minerals. However, just how much is hard to predict.[24]

3.31 The Australian Human Rights Commission noted that many of the major stakeholders agreed for 'the need to explore policy and governance reforms to maximise economic benefits arising from native title and mining development opportunities'.[25]

3.32 The Association of Mining and Exploration Companies expressed concern about the limited consultation in regards to this bill:

> We are also concerned about the limited consultation process to date, contrary to what my colleague has just indicated from the Attorney-General's Department. I do have a chronological record of the limited consultation that we have had, which also included a period of some 12 months where we did not hear anything.
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> …
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> We are also concerned about any real strategy. You will have read in our submission that we referred to the apparent intention of the Commonwealth's amendments to align with the Commonwealth government native title strategy. We have tried to locate that particular strategy and understand it does not publicly exist. In fact, we have recently been told—again by the Attorney-General's Department—that it is not in one single document, so the question

24 Jon Altman and Francis Markham, *Submission 25*, pp. 8-9.

25 Australian Human Rights Commission, *Submission 5*, p. 78.

> is obviously asked: does it exist and, if it does, what is the strategy?[26]

3.33 Fortescue Metals Group, supported by the WA Chamber of Minerals and Energy, raised concerns about the adequacy of consultation on the issue of compensation:

> What I would say is that there is a lot more consultation to be done on compensation if that is to be considered. It is a very complicated issue. There are differing philosophical points of view on how compensation is most appropriately to be provided. There are different views on whether compensation is most beneficial, in an intergenerational sense, when it is provided in cash or in education, jobs, business development and all of those other sorts of things. That will keep going regardless. I have also heard it said by very senior people in the very large companies that there is more money sitting around now in charitable trusts than could ever be spent in the next 100 years by the relatively small numbers of people that you are talking about in the Pilbara. That will only be compounded. The quantum of cash is astronomical. You were handed something earlier. We are talking about, literally, hundreds of millions of dollars a year flowing to Aboriginal groups from the major mining companies, and I think there is a question around the appropriateness of that. But what I would say is that this area of compensation and also the area of reversal of the onus of proof is not in the exposure draft, and I think there is a great deal more thought and great deal more consultation to be done on those two particular areas before any steps are taken.[27]

3.34 As noted above, there were some calls for the native title system to be overhauled and it was argued that piecemeal or isolated changes to the system would not necessarily result in improved outcomes.

3.35 Participants acknowledged the divergence of views around the table and it was apparent that there a strong desire for an ongoing, open dialogue to continue to improve the native title system.

3.36 Summarising the views of stakeholders at the roundtable, Michelle Patterson from AIATSIS posed the question:

> what is it that we could do to bring these issues to an agreeable settlement around the table and that will deliver a fairness and

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26 Graham Short, National Policy Manager, Association of Mining and Exploration Companies, *Transcript of Evidence,* Sydney, 8 February 2013, p. 4.

27 Tom Weaver, Native Title Manager, Fortescue Metals Group Ltd, *Transcript of Evidence,* Sydney, 8 February 2013, p. 33.

patent equity in that system which we are not seeing at the moment?[28]

## Committee comment

3.37 The Committee notes the legislative reforms currently underway will improve the operation of native title in the short to medium term. The Committee appreciates the goodwill amongst stakeholders and the genuine desire to bring clarity, certainty and equity to the native title process.

3.38 The Committee considers that a more comprehensive and holistic review of native title is required for the longer term, and that there is a critical need to engage stakeholders early in this consultative process.

3.39 Accordingly it is recommended that the Minister for Indigenous Affairs refer to this Committee an inquiry into the operation of native title. The inquiry should canvas areas for future reform and appropriate processes to engage stakeholders in the development of a robust and equitable system that delivers sustainable benefits to Indigenous communities and certainty to industry. Such an inquiry could be undertaken at the commencement of the 44th Parliament.

### Recommendation 2

**The Committee recommends that the Minister for Indigenous Affairs, at the commencement of the 44th Parliament, refer to the Standing Committee on Aboriginal and Torres Strait Islander Affairs a comprehensive inquiry into the native title system.**

Shayne Neumann MP
Chair

March 2013

28 Michelle Patterson, Deputy Principal, AIATSIS, *Transcript of Evidence,* Sydney, 8 February 2013, p. 6.